HJ ALI HJ OTHMAN

v.

TELEKOM MALAYSIA BHD

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: J-02-31-1997]
17 JUNE 2003

LABOUR LAW: *Employment - Dismissal - Domestic inquiry - Procedural fairness, whether present in disciplinary proceedings - Audi alteram partem - Nemo judex - Whether employee given reasonable opportunity to defend himself - Point of law not raised at court of first instance, whether might be raised on appeal - Whether domestic inquiry met expectations of arts. 5(1) and 8(1) of Federal Constitution - Whether domestic inquiry must meet requirements of natural justice for trials in court*

Having been earlier dismissed by the respondent – pursuant to a domestic inquiry which found him guilty on charges of dishonesty and fraud – the appellant brought an action in the High Court for a declaration that his dismissal was null and void for want of procedural fairness. The instant appeal was from the decision of the High Court dismissing the appellant's said action. Before the lord justices of appeal, it was contended that the appellant's dismissal from service was made in breach of the *nemo judex* and *audi alteram partem* rules of natural justice, namely, that he was not given a reasonable opportunity to defend himself on the charges.

Held:
Per Gopal Sri Ram JCA

[1] The appellant's submission based on the *nemo judex* rule could not be countenanced in the instant court as it was not canvassed in the court below. Save in exceptional cases, the Court of Appeal will not entertain a point of law not taken at first instance. (pp 313 e & 314 a)

[2] The appellant's contention that his dismissal was in breach of the *audi alteram partem* rule, *ie*, that he had not been given a reasonable opportunity to answer the charges against him, was unsupported by the

evidence. The steps taken by the respondent prior to the inquiry as well as the proceedings at the inquiry were consonant with the duty to act fairly as espoused by arts. 5(1) and 8(1) of the Federal Constitution. (p 314 b)

[3] The law does **not** expect a domestic inquiry to have all the trappings and the suits of a formal trial in a court. (p 314 d-e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Setelah dibuang kerja oleh responden – ekoran satu penyiasatan dalaman yang mendapatinya bersalah atas tuduhan curang dan fraud – perayu memfail tindakan di Mahkamah Tinggi untuk deklarasi bahawa pembuangan kerjanya adalah tak sah dan batal kerana kegagalan keadilan prosedur. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi yang menolak tindakan perayu. Di hadapan hakim-hakim rayuan, ianya dihujah bahawa pembuangan perayu dari perkhidmatannya dibuat dengan mengetepikan kaedah-kaedah keadilan asasi *nemo judex* dan *audi alteram partem,* yakni bahawa beliau tidak diberi peluang munasabah untuk membela diri atas tuduhan yang dikenakan.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Penegasan perayu berdasarkan kaedah *nemo judex* tidak dapat diterima oleh mahkamah semasa oleh kerana ia tidak dihujah di mahkamah dibawah. Kecuali dalam kes-kes yang luar biasa, Mahkamah Rayuan tidak akan melayan mana-mana persoalan undang-undang yang tidak dikemukakan di mahkamah pertama.

[2] Hujah perayu bahawa pembuangan kerjanya telah melanggar kaedah *audi alteram partem,* iaitu, bahawa beliau tidak diberi peluang munasabah untuk menjawab tuduhan-tuduhan terhadapnya, tidak disokong oleh keterangan. Langkah-langkah yang diambil oleh responden sebelum penyiasatan serta prosiding yang diikuti semasa penyiasatan adalah bertepatan dengan tanggungjawab untuk bertindak adil sepertimana yang disaran oleh art. 5(1) Perlembagaan Persekutuan.

[3] Undang-undang **tidak** mengharapkan sesuatu penyiasatan dalaman untuk memperlihatkan segala ciri-ciri dan karenah yang ada pada suatu perbicaraan formal di mahkamah.

Rayuan ditolak.]

Case(s) referred to:
Gilwant Singh v. Abdul Khalik [1965] 2 MLJ 55 ***(foll)***
Kanda v. The Federation of Malaya [1962] MLJ 169 ***(refd)***
Maneka Gandhi v. Union of India [1978] AIR SC 597 ***(refd)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(refd)***
Pierson v. Secretary of State for the Home Department [1997] 3 All ER 577 ***(refd)***
The Board of Education of the Indian Head School v. Knight [1990] 1 SCR 653 ***(foll)***

Legislation referred to:
Federal Constitution, arts. 5(1), 8(1)

For the appellant - RK Menon (Hj Khutubul Zaman); M/s RK Menon & Co
For the respondent - Sowaran Singh; M/s Raman Saad & Assoc

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-172-92]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:
This is the judgment of the court.

This appeal does not raise any new point of law. It merely has to do with the application of settled law to the peculiar facts of this case. The broad question at issue here is whether the appellant received procedural fairness in the hands of the respondent before he was dismissed from the latter's employment. The brief facts relevant to that issue lie in a narrow compass.

At all material times the appellant was in the respondent's employment. In 1990, disciplinary proceedings were commenced by the respondent against the appellant for misconduct. Five charges were formulated and served on the appellant. In a gist, they concern a 'form guarantee' of the respondent said to have been dishonestly appropriated by the appellant and fraudulently used by him to obtain medical treatment for his wife from the General Hospital at Johor Bahru. A domestic inquiry found the appellant guilty on four charges but acquitted him of the fifth. By a letter dated 3 July 1990, the appellant was informed that he was dismissed from service and that he might avail himself of the domestic appellate machinery. The appellant then appealed, but without success. Dissatisfied, the appellant brought an action against the respondent claiming, *inter alia*, a declaration that his dismissal

was null and void. After a trial at which *viva voce* evidence was led, the High Court found against the appellant and dismissed his action. The present appeal is directed against that order.

Before us it was argued that the appellant's dismissal was bad for breach of both the nemo judex and the audi alteram partem branches – what Lord Denning in *Kanda v. The Federation of Malaya* [1962] MLJ 169 called the twin pillars – of the rules of natural justice. These rules are directed at ensuring impartiality and fairness in public decision making. They are encompassed in arts. 5(1) and 8(1) of the Federal Constitution and are directed at giving a citizen the minimum standards of fairness in all forms of State action. See, *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64; *Maneka Gandhi v. Union of India* [1978] AIR SC 597; *Pierson v. Secretary of State for the Home Department* [1997] 3 All ER 577. In the context of modern administrative law, they are treated as forming part of the wider doctrine of procedural fairness and vary in their content and applicability according to the facts of a given case. See, The Board of Education of the *Indian Head School v. Knight* [1990] 1 SCR 653.

We find it unnecessary to deal with the complaint based on the alleged breach of the *nemo judex* rule because, as observed by Denis Ong Jiew Fook JCA during argument and conceded by learned counsel for the appellant, this is a point not canvassed in the court below. The principle is too well settled that this court will not, save in limited cases, entertain a point of law not taken at first instance. If authority is needed for this it may be found in the decision of the Federal Court in *Gulwant Singh v. Abdul Khalik* [1965] 2 MLJ 55 where Thomson LP said at p. 58:

> A point which is not raised at the trial and which is raised for the first time in the Court of Appeal must always be most jealously scrutinized (*The Tasmania* [1890] 15 App Cas 223 at p. 225). The question of whether effect should be given to such a point is, however, one for discretion (see *Perkowski v. Wellington Corp* [1959] AC 53 at p 69) and the principles on which that discretion may be exercised have been thus set out in the case of *Connecticut Fire Insurance Co v. Kavanagh* [1892] AC 473 at p. 480) (per Lord Watson):
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> > When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea.

In the present case, we found ourselves in a most difficult position so far as the point at issue is concerned. It was not raised in the pleaded case. It was not properly pursued in evidence. No argument was directed upon it. Accordingly, the judge was not given an opportunity to express his views upon it. It is in these circumstances that we decided not to entertain any argument on the *nemo judex* point.

So far as the *audi alteram* point is concerned, two separate and distinct submissions were advanced. The first was that the appellant had not been given a reasonable opportunity of defending himself against the charges levelled against him. We found no basis whatsoever in this complaint. The High Court, in its judgment, when dealing with this part of the case said:

> … the Inquiry Panel accommodated the plaintiff's request on the procedure to be followed in the inquiry. So what is he complaining about not being heard – the rule of *audi alteram partem* not being complied as alleged by the plaintiff therefore has no application at all in this case. At the end of the proceedings, the plaintiff expressed his satisfaction over the conduct of the Inquiry Panel in carrying out the inquiry.

In our judgment this is an entirely proper direction given the facts and the evidence placed before the trial judge. We find the steps taken by the respondent prior to the inquiry and the proceedings at the inquiry to be consonant to the duty to act fairly imposed on the respondent by law and art. 5(1) read with art. 8(1) of the Constitution. Where the appellant has, with respect, misled himself is, we think, in equating a domestic inquiry with a formal trial in a court. This is not the law. In this regard, we agree and gratefully adopt the view expressed by L'Heureux-Dubé J speaking on behalf of the majority of the Supreme Court of Canada in *The Board of Education of the Indian Head School v. Knight*:

> It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair.

For the reasons already given, we dismissed this appeal and made those orders usually consequent upon a dismissal.